No. 88-395

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JOHN C. ELLINGSWORTH, Warden,
Sussex Correctional Institution, and
CHARLES M. OBERLY, III, Attorney
General of the State of Delaware,

Petitioners,

v.

GEORGE L. REYNOLDS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This Court should grant review in this case not only because of what the court of appeals ruled, but because of the way it proceeded. Every federal habeas action filed by a state prisoner creates an atmosphere of uneasiness between the state and federal judiciaries. When a federal court, in such a proceeding, examines the adequacy of a state court's procedural default ruling, that tension is

exacerbated. Basic principles of comity and federalism mandate that in such situations, the federal court must proceed cautiously – intruding only when necessary and then only with a surgical scalpel. Here, because the court of appeals acted before surgery was necessary and then used a much broader instrument, its judgment should be vacated.

1. The Court of Appeals Should Have Stopped When It Determined That There Was a Potentially Unexhausted Claim.

Initially, the court of appeals declared the state's procedural ruling "inadequate" when it need not have. After it determined that respondent's Sixth Amendment claim was possibly unexhausted, it could have simply remanded the matter to the district court, deferring its examination of the state court's procedural ruling until the exhaustion issue had been resolved. Respondent suggests that the court of appeals properly rejected that approach. In his view, the court of appeals could expound on the principles of *Wainwright v. Sykes*, 433 U.S. 72 (1977), even with the presence of an unexhausted claim, because its opinion did not touch on the "merits" of any claim.[1] Br. in Opp. at 3-4. But even if one accepts respondent's characterization of the scope of the court of appeals' opinion, its action cannot be justified. Indeed,

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[1] One need not be a fortune teller to predict, on the basis of the court of appeals' language, what that court viewed as the appropriate resolution on the merits of Reynolds' due process claim. The court repeatedly indicated its views on the merits of that claim. Pet. App. 5, 11 & n. 10.

its conduct in this case was directly inconsistent with this Court's approach in *Engle v. Isaac*, 456 U.S. 107 (1982). In *Isaac*, only after this Court had concluded that Issac's entire petition had been exhausted did it proceed to consider whether Issac had procedurally defaulted his claim. 456 U.S. at 125 n. 28; *id.* at 140-41 & n. 9 (Brennan, J., dissenting). On the other hand, almost every member of the Court recognized that if an unexhausted claim had been present in Isaac's petition, the appropriate resolution under *Rose v. Lundy*, 455 U.S. 509 (1982), would have been dismissal, 456 U.S. at 123 n. 25, without any exploration of the principles articulated in *Sykes*. 456 U.S. at 137-38 (Brennan, J., dissenting). When the subject of federal court scrutiny is so delicate a subject as the state judiciary's administration of its own rules, the mandate under *Rose* is even more applicable. *Slayton v. Smith*, 404 U.S. 53, 54 (1971).

An order vacating the court of appeals' ruling because of this exhaustion principle would also rectify the real "unfairness" of the decision. The issue of the "adequacy" of the state procedural ruling was never raised by Reynolds, either in the district court or in his original briefing in the court of appeals. Instead, the question of the "adequacy" of the Delaware procedural default rule and the court of appeals' answer emerged simultaneously in the lower court's opinion. Thus, the court of appeals interpreted, analyzed, and then struck down the state procedural ruling, all without any prior argument from the parties. This Court should summarily reverse because of the possiblility of an exhausted claim.

If and when Reynolds returns to federal court,[2] the parties can then fully address the concerns of "adequacy" now identified by the court of appeals.

2. A Deliberate Bypass of the Opportunity to Object Is an Adequate Ground to Bar Federal Habeas Relief.

Every other court which considered this case prior to the court of appeals held that Reynolds had chosen not to present his due process claim to the trial court or state supreme court on appeal because of strategic tactical considerations. Respondent makes no challenge to those findings here. But, although it concluded that the motives for the actions of Reynolds' attorneys had been fully explored in the state court hearings, Pet. App. 27, the court of appeals ignored those in making its determination of the "adequacy" of the state procedural bar. Again, slicing with a broad knife, it looked not at the basis of the state court's holding, but at its procedural rules in the abstract. Respondent again says the court of appeals was correct, offering two reasons why these findings of deliberate bypass were irrelevant. First, he suggests that under *Sykes*, an examination of counsel's tactical motivations is permissible only after the state procedural ruling is found "adequate." Br. in Opp. at 13-14. Secondly, he argues, again citing *Sykes*, that tactical decisions can bar federal habeas relief only if the opportunities under state rules

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[2] In his brief in opposition, Reynolds does not suggest that he will drop his Sixth Amendment claim. Thus, unless such a claim is now found to be procedurally barred under Delaware's "inadequate" procedural rules, there is a real possibility that *all* of Reynolds' petition will be dismissed under *Rose*.

which were bypassed contained an express forfeiture sanction. Br. in Opp. at 12, 14. The first reason is hard to reconcile with this Court's action in *Henry v. Mississippi*, 379 U.S. 443 (1965). There, this Court suggested that the state procedural ruling was inadequate because the state had an insufficient interest in requiring that the objection be made earlier than when it had actually been presented. However, the Court remanded the matter for exploration of counsel's tactical motivations, holding that federal review would still be unavailable if counsel, for strategic reasons, had not exercised the opportunity to raise the claim earlier. Indeed, the Court seemingly drew a line between a forfeiture analysis under the adequate state law ground and the deliberate bypass doctrine under *Fay v. Noia*, 372 U.S. 391 (1963). *Henry*, 379 U.S. at 448 n. 3. The second rationale advanced by respondent is contrary to *Kaufman v. United States*, 394 U.S. 217 (1969), where this Court held that a federal prisoner could be denied post-conviction relief if he "deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal – e.g., motion to suppress under Fed. Rule Crim. Proc. 41(e) or appeal under Fed. Rule App. Proc. 4 (b)." 394 U.S. at 227 n. 8. Such power existed even though neither of the rules cited, nor 28 U.S.C. § 2255 itself, contained any express waiver language indicating that a failure to file a suppression motion or pursue the issue on appeal would preclude further review. *See Davis v. United States*, 411 U.S. 233, 239-40 (1973).[3]

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[3] Indeed, the rationale of the court of appeals and respondent is inconsistent with a line of Seventh Circuit cases which

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Finally, the conclusion of the court of appeals, relegating a defendant's strategic choices to a secondary concern, is directly inconsistent with the decision of the Seventh Circuit in *Brownstein v. Director, Illinois Department of Corrections*, 760 F.2d 836 (7th Cir.), *cert. denied*, 474 U.S. 858 (1985). In *Brownstein*, the defendant had not objected when he was tried without a jury. But Illinois had no procedural rule requiring an objection, and indeed, the absence of a waiver of a jury trial was an error which could be claimed at any time. Yet, the court of appeals upheld the district court's dismissal of Brownstein's federal habeas petition. Realizing that the absence of any state procedural rule rendered a procedural default analysis under *Sykes* irrelevant, the court of appeals instead looked to *Fay v. Noia* for guidance. Because Brownstein was aware of his right to a jury trial and, despite the opportunity, voiced no objection to his bench trial solely to obtain a strategic advantage, the

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have held that a federal defendant's failure to raise a claim on direct appeal bars collateral review of that claim unless he can establish cause and prejudice under *Sykes*. In doing so, the Seventh Circuit rejected the notion that *Sykes* does not apply to such failures because the relevant procedural rule, Fed. R. App. Pro. 4, does not contain a forfeiture provision. *See, e.g., United States v. Kovic*, 830 F.2d 680, 683-84 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 778 (1988); *Williams v. United States*, 801 F.2d 1301, 1304-06 (7th Cir. 1986); *United States v. Griffin*, 765 F.2d 677, 679-80 (7th Cir. 1985); *Norris v. United States*, 687 F.2d 899, 902 (7th Cir. 1982). Surely, "society's justified interests in the finality of criminal judgments," *United States v. Frady*, 456 U.S. 152, 175 (1982), is not solely limited to protecting against post-conviction litigation of claims, such as defective indictments or jury instructions, for which the criminal procedure rules set out explicit procedures.

court of appeals held that he, under the equitable principles described in *Noia*, was barred from federal relief. *Brownstein* makes clear that *Noia* continues to define the outer bounds of the proper exercise of habeas jurisdiction in certain instances. Because the lower court's decision conflicts with decisions of this Court and other courts of appeal, the petition should be granted in order to clearly articulate the continued reach of *Noia*.

3. Delaware's Version of *Wainwright v. Sykes* Was Not Too "Novel" A Procedural Rule.

At heart, the court of appeals held that the state procedural ruling here was inadequate because the application of the state's version of *Sykes* was too "novel." Pet. App. 20-25. In sum, the court of appeals read *Sykes* and "the independent and adequate" state ground doctrine as granting respondent some "vested right" in the rules for access to state post-conviction relief in effect at the time of his trial. First, it is not clear that this Court's rulings under the adequate state ground concept support such a conclusion. Even if they can be so read, it is not clear that those cases, arising in the exercise of this Court's review of decisions of state courts on direct appeal, can be easily transferred to the situation where state rules bar state collateral review because of a failure to raise an issue at trial or on direct appeal. If "adequacy" essentially reflects a balancing between the state procedural rules and the federal substantive claim, the balance point is surely different when the defendant has waived or bypassed his chance to present the issue on direct appeal. In that situation, "society's legitimate interest in the finality of

the judgment has been perfected." *United States v. Frady*, 456 U.S. 152, 164 (1982).

Indeed, respondent's argument would suggest that *Frady* was wrongly decided. When Joseph Frady was convicted in the District of Columbia of first degree murder, the applicable procedural hurdle for claims not presented on direct appeal was the deliberate bypass standard of *Fay v. Noia*. This Court nonetheless required Frady to meet "the 'cause and actual prejudice' standard enunciated in *Davis v. United States*, 411 U.S. 233 (1973), and . . . *Wainwright v. Sykes*, 433 U.S. 72 (1977)." 456 U.S. at 167. Under the decision of the court of appeals in this case, this Court applied the wrong standard in *Frady*.

Finally, there is a missing element in the lower court's analysis of "inadequacy" based on "novelty." Respondent cannot show that he "justifiably relied," *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958), on prior Delaware procedural rules in being able to withhold his due process claim during trial and on appeal to then assert it in a state post-conviction action. In the state courts, respondent never objected that he was unfairly surprised by the application of Delaware's version of *Wainwright v. Sykes* to his case. In the state post-conviction procedings, he tried to establish "cause" based on his attorney's negligence. When that proved unsuccessful, he urged the state supreme court to modify the rule to allow escape from a procedural bar if he could show "cause" *or* "prejudice." If his counsel in the state court did not see application of the procedural default rule to him as novel, it is now hard to see how he has been surprised. Indeed, even if state procedural rulings were unclear on whether post-conviction relief would be

available, this Court has suggested that if, in the face of this uncertainty, the defendant makes a tactical choice to forego an earlier opportunity to present his claim, he cannot later assert it in federal court when the state courts subsequently declare further state relief unavailable. *Murch v. Mottram*, 409 U.S. 41, 45-47 (1972).

CONCLUSION

For the above reasons, this Court should grant the petition for certiorari and reverse the decision of the court of appeals. Indeed, because of the presence of a possibly unexhausted claim, this Court should summarily vacate the lower court's opinion with directions for it to simply remand the matter to the district court.

Respectfully submitted,

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